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**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing	)	
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Filing Date: January 4, 2021	)	Case No.: PSH-21-0009
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Issued: April 1, 2021

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**Administrative Judge Decision**

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Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled “General Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”<sup>1</sup> As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I conclude that the Individual’s access authorization should not be restored.

**I. BACKGROUND**

The Individual is employed by a DOE Contractor in a position which requires that he hold a security clearance. In August 2003, the Individual was charged with Possession of Marijuana. Ex. 1. As part of a prior investigation, the Individual signed and completed a Questionnaire for National Security Positions (QNSP) on December 24, 2013, and the United States Office of Personnel Management’s (OPM) Investigation Services conducted an investigation of the Individual and issued a report of its findings on April 8, 2014. Ex. 5. In a more recent investigation, the Individual signed and completed a QNSP on July 26, 2019, and an OPM report was issued on September 18, 2019. Ex. 4. Based on the information collected, the LSO issued a Letter of

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<sup>1</sup> The regulations define access authorization as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). This Decision will refer to such authorization as access authorization or security clearance.

Interrogatory (LOI) to the Individual, and on December 6, 2019, the Individual submitted his responses to the LOI. Ex. 3.

After these procedures were concluded, the LSO determined that unresolved derogatory information remained in the record which raised significant security concerns about the Individual. Accordingly, the LSO began the present administrative review proceedings on September 28, 2020, by issuing a Notification Letter informing the Individual that the LSO possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. The Notification Letter further informed the Individual that he was entitled to a hearing before an Administrative Judge in order to resolve these substantial doubts. *See* 10 C.F.R. § 710.21.

The Individual requested a hearing and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), the Individual offered his own testimony. *See* Transcript of Hearing, Case No. PSH-21-0009 (hereinafter cited as "Tr."). The DOE counsel submitted five exhibits, marked as Exhibits 1 through 5 (hereinafter cited as "Ex."). The Individual submitted fourteen exhibits, marked as Exhibits A through H.

## **II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS**

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guidelines E (Personal Conduct) and H (Drug Involvement) of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (Adjudicative Guidelines). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process.

Under Guideline E, the Individual's conduct "involving questionable judgement, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information." Adjudicative Guidelines at ¶ 15. The Summary of Security Concerns listed as relevant facts: (1) On two QNSPs signed and dated July 26, 2019, and December 24, 2013, the Individual indicated that he had not been charged with an offense involving drugs or alcohol, despite being charged with Possession of Marijuana in August 2003; (2) In the July 26, 2019, QNSP, the Individual indicated that he had not used any drugs or controlled substances in the past seven years, but an OPM background investigation revealed the Individual had last used marijuana approximately two years prior to his interview with an OPM investigator; (3) In a December 24, 2013, QNSP, the Individual stated he had not used any illegal drugs or controlled substances in the past seven years, but admitted in an interview with an OPM investigator that he had used marijuana once or twice since August 2003. Ex. 1 at 4-5. The LSO's allegations that the Individual provided conflicting or incomplete information at different times and engaged in behavior that showed a lack of judgment justify the LSO's invocation of Guideline E. Adjudicative Guidelines at ¶ 16(a)-(c).

The LSO cited Guideline H (Drug Involvement) of the Adjudicative Guidelines as another basis for revoking the Individual's security clearance. Ex. 1. Not only do illegal substances cause mental or physical impairment, but they also raise "questions about a person's ability or willingness to comply with laws, rules, and regulations." Adjudicative Guidelines ¶ 24. The Summary of Security Concerns asserted that: (1) The Individual stated during an August 15, 2019 OPM background investigation that he last used marijuana about two years prior to the interview, that he uses marijuana approximately once a year, and that he used marijuana while holding a security clearance; (2) During a January 23, 2013 OPM background investigation, the Individual stated that he had used marijuana approximately once or twice since his August 2003 Possession of Marijuana charge; (3) The Individual indicated during an August 15, 2019, OPM background investigation that he intended to continue using marijuana approximately once a year, contrary to his December 2019, LOI response, stating that he did not want his use of controlled substances to jeopardize his clearance. Ex. 1 at 5. The Individual's admitted drug use justifies the LSO's invocation of Guideline H of the Adjudicative Guidelines at ¶ 25 (a), (c), (f), and (g).

### **III. REGULATORY STANDARDS**

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." Adjudicative Guidelines ¶ 2(a). The protection of the national security is the paramount consideration. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The Individual must come forward at the hearing with evidence to convince the DOE that granting or restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The Individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

#### IV. FINDINGS OF FACT

In connection with the security clearance process, the Individual signed and submitted a QNSP dated December 24, 2013, and another one dated July 29, 2019. Ex. 5 at 36; Ex. 4 at 58. When asked if he had ever been charged with an offense involving drugs, the Individual marked “no” on both forms. Ex. 5 at 36; Ex. 4 at 48. When asked if he had used any illegal drugs or controlled substance within the last seven years, the Individual marked “no” on both forms *Id.* He also marked “no” on both forms in response to the question “[h]ave you ever illegally used or otherwise been involved with drugs or controlled substances while possessing a security clearance other than previously listed?” *Id.*

The Individual was interviewed by an OPM investigator on January 23, 2014, in connection with the answers he provided in his 2013 QNSP. Ex. 5 at 49. The Individual was confronted with a 2003 Possession of Marijuana charge that he omitted from his QNSP. *Id.* at 51. The Individual explained that he failed to list the charge because “it was more than five years ago[,]” and because the matter had been dismissed. *Id.* He stated that he had used marijuana once or twice since the 2003 charge but could not recall specific dates of use. *Id.* When asked whether he had used marijuana while holding a clearance, the Individual stated that he did not know the dates he held a clearance, so he had indicated on his QNSP that he had not used illegal drugs while holding a clearance. *Id.* The Individual “agreed to change his answers from no to yes regarding having been charged with an offense involving drugs and using illegal drugs while [in the] possession [of] a security clearance.” *Id.* The investigator notes that the Individual stated he did not have any intention of using marijuana in the future. *Id.*

As before, an OPM investigator interviewed the Individual on August 15, 2019, in relation to his 2019 QNSP. Ex. 4 at 62. When confronted with information indicating he had used marijuana while holding a clearance, and the fact that he was charged with Possession of Marijuana, the Individual stated that he had provided this information in a prior investigation and that there were no new developments to report. *Id.* at 63-64. When asked about the last time he had used marijuana, the Individual indicated it was approximately two years ago, and further stated that he had not provided that information because he had used marijuana in two states where the use was legal. *Id.* at 64. Accordingly, he did not believe he was required to provide this information. *Id.* The OPM investigator noted that this drug use occurred while the Individual held a security clearance, and stated that the Individual “[was] not sure if there [was] any policy against using while possessing a security clearance.” *Id.* The Individual further stated that he used marijuana about once a year, and that he intended to use marijuana “on a recreational basis to relax.” *Id.*

On December 6, 2019, the Individual signed and completed an LOI. Ex. 3. In the LOI, the Individual indicated that he had purchased and used marijuana multiple times in cigarette form, and that the exact date of his last use was unknown. *Id.* at 1-2. He described the frequency of his use as “rarely,” and stated that he had never sought counseling and had never required medical treatment as a result of drug use. *Id.* at 2-3. The Individual also disclosed his 2003 Possession of Marijuana charge and expressed his intention to refrain from illicit drug use. *Id.* at 4.

## Individual's Exhibits

The Individual submitted performance appraisals for years 2018 through 2020. Ex. B1-B3. These appraisals indicated ratings from “meets expectations” to “significantly exceeds expectations.” *Id.* The Individual was also the recipient of the 2020 “Gears of Government Award,” in addition to a number of other certificates of appreciation, certificates of achievement, and civilian service awards. Ex. C1-C2.

The Individual also submitted affidavits from three of his associates. One associate, who has known the Individual for twenty-three years and is familiar with the concerns presented in the Summary of Security Concerns, indicated that he has “personally found the Applicant to be very trustworthy, reliable and consistently exercises good judgement.” Ex. D1 at 1. This associate went on to state that the Individual’s healthy lifestyle and maturity levels assure him that the Individual will not engage in future drug use. *Id.* Another associate acknowledged the Individual’s “lapse in judgement” on those occasions he used marijuana, but she insisted the Individual is not a threat to national security, as he is a “strong and intelligent man of character[.]” Ex. D2 at 1. A third affiant noted the Individual’s “goodness of character” and reliability. Ex. D3 at 1.

The Individual signed and submitted a statement of intent indicating that he is not addicted to any controlled substances, that he does not intend to use any controlled substances in the future, regardless of his security clearance status, that he will submit to random drug testing, and that he recognizes the fact that his clearance can be revoked in the event of a positive drug test. Ex. F at 1. The Individual also submitted Exhibits G1, an October 8, 2020, Reuters article, Exhibit G2, information pertaining to Marijuana Decriminalization and Legalization, and Exhibit H, a United States Office of Personnel Management Memorandum (the Memorandum).<sup>2</sup>

## The Hearing

The Individual began his employment in his current position in 2015. Tr. at 1. When asked about his marijuana use, the Individual testified that he “would occasionally partake” to relax while spending time with friends, approximating the frequency of his use at “[m]aybe once or twice a year.” Tr. at 14-15. The Individual further stated that it has been years since he has had any in-person contact with the individuals with whom he used to use marijuana. Tr. at 15. When asked

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<sup>2</sup> DOE Counsel objected to the admission of these exhibits into the record. At the hearing, I determined that these exhibits would be accepted into the record, but that they would be allotted the weight I deem appropriate. Tr. at 7-8. Although many jurisdictions have decriminalized the recreational use of marijuana in some form or another, the fact remains that the recreational use of marijuana is still not permitted under federal law. Accordingly, information regarding the decriminalization of marijuana and changing social norms surrounding the use of recreational marijuana is irrelevant to the case at hand.

Further, the Memorandum counsel submitted does not bear on the case at hand, as personnel security proceedings are governed by DOE regulations at 10 C.F.R. Part 710 and the National Security Adjudicative Guidelines. The Memorandum’s guidance concerns an agency’s assessment of the suitability/fitness of applicants or appointees on the basis of marijuana. Assessing suitability or fitness for employment is not tantamount to assessing the suitability of an individual to hold a security clearance. Further, footnote 3 of the Memorandum specifically states “[t]his memorandum does not address consideration of marijuana use in determinations of eligibility for access to classified information or for employment in sensitive national security position[.]” Ex. H at 1.

how he would respond if he was invited to partake in drug use, the Individual stated that he would decline the offer, stating “I definitely don’t need that in my life any longer.” Tr. at 16, 36.

The Individual acknowledged that he completed a QNSP in 2013, and that he marked “no” to the question regarding whether he had used marijuana within the past seven years. Tr. at 17. The Individual acknowledged that, when asked, he had admitted to the OPM investigator that he had used marijuana once or twice within the past seven years. Tr. at 18-19. The Individual had been asked about his marijuana use in the context of undergoing questioning regarding his 2003 Possession of Marijuana charge, which he had omitted in the QNSP. Tr. at 19. He explained that he had omitted the 2003 charge from his QNSP not only because it was approximately ten years old, but because it had been dismissed, and accordingly, he did not believe he was required to provide this information. Tr. at 19. He had also omitted information pertaining to other issues, like financial matters, on his QNSP and explained that he was not diligent in completing the form. Tr. at 20. The Individual was subsequently granted his clearance. Tr. at 20.

The Individual asserted that he made the same mistakes in his 2019 QNSP, in that he had omitted information regarding his marijuana use in the past seven years. Tr. at 21. When asked why he had omitted the same information, the Individual stated that he had “rushed through it again[.]” Tr. at 22. In the same fashion as before, an OPM investigator asked the Individual about his marijuana use, during a 2019 interview. Tr. at 23. The Individual testified that he told the OPM investigator that he had previously admitted to marijuana use in a 2014 interview. Tr. at 23. The Individual further stated that he “didn’t do a very good job in completing the questionnaires[.]” but provided truthful answers during his interviews with investigators. Tr. at 23-24. When pressed on the matter during questioning by DOE counsel, the Individual testified that he felt he “did a terrible job actually filling out the questionnaires[.]” as “there would have been no reason for [him] to” incorrectly report information that had already been disclosed. Tr. at 32. He testified that he could not state with certainty whether he was trying to hide these facts at the time he completed his QNSPs, and that once the investigator asked about the omitted facts, he was forthcoming with information. Tr. at 37-39.

Later in his testimony, the Individual confirmed that he continued to periodically use marijuana after the 2003 Possession of Marijuana charge, about once or twice a year. Tr. at 28-29. He went on to confirm the veracity of his prior statement to the OPM investigator in 2019, in that he had not used marijuana in approximately two years. Tr. at 30. He stated that marijuana was “never a big part of [his] life,” and that he has since undergone various lifestyle changes, including a marriage and a different set of friends. Tr. at 30, 39. The Individual also insisted that marijuana was never something he “needed” or “had to have.” Tr. at 31.

Although he stated to the OPM investigator in 2014 that he intended to discontinue his marijuana use, he continued using marijuana after having made this statement, but he has since come to recognize the difficulties marijuana use has caused him. Tr. at 33, 35. After being asked what his intentions are moving forward with regard to his illicit drug use, the Individual stated that he does not have any intention of using marijuana in the future, especially while holding a security clearance. Tr. at 39.

## V. ANALYSIS

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government places a high degree of trust and confidence in individuals to whom it grants access authorization. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The issue before me is whether the Individual, at the time of the hearing, presents an unacceptable risk to national security and the common defense. I must consider all the evidence, both favorable and unfavorable, in a common sense manner. “Any doubt concerning personnel being considered for access for national security eligibility will be resolved in favor of the national security.” Adjudicative Guidelines ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Because of the strong presumption against granting or restoring security clearances, I must deny access authorization if I am not convinced that the LSO’s security concerns have been mitigated such that restoring the Individual’s clearance is not an unacceptable risk to national security.

### **Guideline E Concerns**

The Adjudicative Guidelines state that an individual may mitigate security concerns under Guideline E, in pertinent part, if “[t]he individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Guideline E at § 17(a). The Individual may also mitigate concerns under Guideline E if “[t]he offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Guideline E at § 17(c).

In his closing statement, counsel for the Individual argued that the fact that the Individual volunteered correct and truthful information regarding his drug use after omitting it on two separate QNSPs is “strong circumstantial evidence” that the omissions were a mistake. Tr at 43. Counsel urges me to accept that the omissions were “a dumb mistake” because the Individual failed to take “the forms as seriously as he should have.” *Id.* I am also asked to believe that the Individual will not repeat this behavior. *Id.* I find these arguments unpersuasive. As an initial matter, the Individual could not provide any articulable reason for omitting this information, not once, but twice. The Individual only testified that he could not provide a specific reason as to why he made the same omissions on both QNSPs. Tr. at 32, 37-39. When asked whether he was trying to hide information, the Individual stated, “I don’t know if I was or not. ...I may have been at the time.” *Id.* at 38. However, the record does contain some explanation as to why the Individual failed to disclose his marijuana use and 2003 Possession of Marijuana charge. According to the record, his failure to provide truthful answers regarding his drug use while holding a clearance and his 2003 drug charge can be attributed to confusion over the years he held a clearance and whether he needed to disclose a charge that had been dismissed. Ex. 5 at 51. However, the OPM investigator notes in the 2014 report that the Individual “agreed to change his answers from no to yes regarding

having been charged with an offense involving drugs and using illegal drugs while [in] possession [of] a security clearance.” *Id.* Accordingly, the Individual had arguably been placed on notice and appropriately reminded to disclose this information on future QNSPs. *See Personnel Security Hearing*, OHA Case No. PSH-20-0067 at 8-9 (2020). Despite the fact he was told to disclose this information, the Individual still omitted these facts from his 2019 QNSP. Ex. 4 at 48. Additionally, although the Individual testified, and counsel asks us to accept, that the Individual was forthcoming with this omitted information, the fact remains that the regulations require the Individual to correct these omissions prior to being confronted with them. There is nothing in the record indicating that the Individual disclosed his drug use and 2003 charge prior to being confronted by investigators. For the foregoing reasons, I cannot find that the Individual made any good faith efforts to correct the aforementioned omissions prior to being confronted with the facts.

I also cannot find that the offense was so minor, that so much time has passed, that the behavior was so infrequent, or that it happened under such unique circumstances that it is unlikely to recur. The Individual last omitted information from his QNSP in 2019, only several years ago, after being explicitly told to disclose this information. Further, at the very least, the lack of attention and care paid to both QNSPs during the application process is noteworthy due to the very nature of the documents the Individual was completing. A QNSP is an important tool in establishing whether an individual is fit to hold a security clearance, and accordingly, an applicant is held to a higher standard when completing such a form. Any individual “seeking a security clearance should be well aware of the need for complete, honest and candid answers to DOE questions. Therefore[,] when completing a QNSP such an individual should err on the side of providing too much rather than too little information.” *Personnel Security Hearing*, OHA Case No. TSO-0023 at 30-31 (2003).<sup>3</sup>

Because the Individual has not satisfied any of the mitigating conditions under Guideline E, I find that the security concerns raised under Guideline E in the Statement of Concerns have not been resolved.

### **Guideline H Concerns**

The Adjudicative Guidelines provide, in relevant part, that an individual may mitigate security concerns under Guideline H if:

- a) The behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- b) The individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

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<sup>3</sup> The Individual informed the OPM investigator during his 2014 interview that he had no intention of using marijuana in the future. Ex. 5 at 51. However, as indicated in the 2019 OPM report, the Individual approximated his last incident of marijuana use as having taken place two years prior and stated that he could not recall the exact date of use. Ex. 4 at 64.

- (1) Disassociation from drug-using associates and contacts;
- (2) Changing or avoiding the environment where drugs were used; and
- (3) Providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

Adjudicative Guidelines at ¶ 26(a)-(b).

In the case at hand, the Individual credibly testified that he last used marijuana several years ago, and further, this explanation remained consistent throughout the record. Ex. 4 at 64; Tr. at 30. The record also provides that the Individual has implemented a number of lifestyle changes to facilitate his abstinence. Tr. at 30, 40. Notably, the Individual insisted that he no longer associates with the individuals with whom he partook in illicit drug use. *Id.* at 39. He also voiced his intention to discontinue marijuana use in the 2019 LOI, and went on to confirm that sentiment in a signed statement of intent, which also acknowledged the possibility that his clearance can be revoked in the event of a positive drug test. Ex. 3 at 4; Ex. F at 1. When specifically asked whether he intended to use illicit substances in the future, the Individual stated that he had no such intentions, especially while holding a security clearance. Tr. at 39. The Individual also repeatedly stated at various times that he was an infrequent user of marijuana, partaking only once or twice a year, and as such, abstinence from marijuana use would pose no particular difficulty to him. *Id.* at 14-16, 28-31, 36. His lifestyle changes did not go unnoticed by those around him. One affiant specifically commented on the Individual's maturity and healthy lifestyle, stating that these factors provided him with the assurance that the Individual will no longer partake in illicit drug use. Ex. D1 at 1.

For the reasons set forth above, I conclude that the Individual has mitigated the security concerns raised in the Summary of Security Concerns under Guideline H.

## **VI. CONCLUSION**

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guidelines E and H of the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving all of those concerns. Therefore, I cannot conclude that restoring DOE access authorization to the Individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not restore access authorization to the Individual at this time.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman  
Administrative Judge  
Office of Hearings and Appeals